

INDIVIDUAL HEALTH PLANS (IHPs): LEGAL IMPLICATIONS UNDER IDEA AND SECTION 504 AND PRACTICAL IDEAS

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§504 AND IDEA IMPLICATIONS

- The Office for Civil Rights (OCR) rulings on health plans (IHPs) impact IDEA students, since OCR can investigate special student complaints (but under §504 requirements)
- This is because all IDEA students have residual §504 protections (addressed under IDEA regulations and procedures)
- In addition, there are some IHP cases under IDEA

IDEA ISSUES AND CASES ON HEALTH PLANS (IHPs)

○ Legal Issues:

Must IHPs be in IEPs, and developed under IEP team process?

Are the IHP accommodations and services “school health services” or “nursing services”?

IDEA ISSUES AND CASES ON HEALTH PLANS (IHPs)

Related Services

“Supportive services as are required to assist a child with a disability to benefit from special education...”—34 CFR 300.34(a)

IEP must include related services needed to advance in goals and participate in school—34 CFR 300.320(a)(4)

Related Services

Includes “school health services and school nurse services” designed to “enable a child with a disability to receive FAPE”—34 CFR 300.34(c)(13)

“School health services” are those that may be provided by a nurse “or other qualified person”

Irving Ind. Sch. Dist. v. Tatro (S.Ct. 1984)

School required to provide intermittent catheterization to student 3-4 times per day to student with multiple issues

Bright-line rule—If a student needs a health service to attend school, and a physician is not required to provide it, school must perform it

◦ ***Irving Ind. Sch. Dist. v. Tatro* (S.Ct. 1984)**

Moreover, service was simple. An aide could be trained to provide the service in a single training session

What if the service is more intricate?
What if the services are so complex that the student would need a full-time nurse 1:1 in the school setting?...

◦ ***Cedar Rapids CSD v. Garret F.* (S.Ct. 1999)**

Student required a 1:1 full-time nurse

S.Ct. reasserted the bright-line rule of *Tatro*, and thus, school had to pay for a full-time 1:1 nurse, as that was needed for student to attend and receive FAPE

◦ **So, do IHPs belong in IEPs?**

Based on the regulations and Supreme Court cases, the starting proposition is that health services that are needed for FAPE or participation in school are related services that must be included in students' IEPs

Let's see what the modern cases say....

◦ ***L.H. v. Fairlawn BOE, 70 IDELR 104***
(D.N.J. 2017)

Parent of 18-year-old with seizure disorder requested nurse on bus

Conclusive data from Dr was pending

Court held that if the nursing services were necessary for FAPE (i.e., a related service), then they would have to be included in the IEP (but data not yet conclusive on the issue)

◦ ***Oconee CSD v. A.B., 65 IDELR 297***
(M.D.Ga. 2015)

Teen with profound physical and mental disabilities, including severe seizures

If a seizure lasted more than 5 mins, rectal Diastat had to be administered to prevent risk to life

Dispute over whether EMS was to be called or aide on bus needed to administer Diastat

◦ ***Oconee CSD v. A.B., 65 IDELR 297***
(M.D.Ga. 2015)

Because school could not ensure that EMS could provide the Diastat in time, an aide on bus was required as part of the IEP

Court cited regulations requiring school health services needed for FAPE

Note—aide administration of Diastat could be in an IHP (but developed through IEPT process)

○ ***J.K. v. Middleton SD*, 56 IDELR 105 (D.N.H. 2011)**

Student with latex allergy had IEP with plan to prevent late exposure

Parent argued that despite plan, latex made it into the school several times

Court noted student was never exposed, and IEP did not call for a latex-free facility, so no failure to implement IEP

○ ***J.K. v. Middleton SD*, 56 IDELR 105 (D.N.H. 2011)**

Note that school did not contest that latex prevention plan had to be in IEP

Court noted that student had an IHP that was treated as part of the IEP

Semantics? If IHP sets forth the health services needed for participation, the IHP states related services that must be part of IEP

○ ***D.C. v. New York City DOE*, 61 IDELR 25 (S.D.N.Y. 2013)**

10-year-old with AU, ID, SI also had severe seafood allergy (smell could trigger anaphylaxis)

School did not dispute that IEP required provisions for a seafood-free environment

But, offer of FAPE was in a school that was not seafood-free (no set plans for preventing exposure), so private reimbursement was awarded

◦ **Princeton City Schs., 65 IDELR 189 (Ohio SEA 2015)**

Student with physical disabilities required toileting services and ointment

But, IEP did not mention such services as a related service, and there was no IHP as part of the IEP stating such services

SEA found that the services were a required related service that had to be in IEP (as IHP or some other way)

◦ **Barney v. Akron BOE, 70 IDELR 227 (N.D. Ohio 2017)**

A contrary position...

Student eligible under IDEA due to ADHD, also had peanut allergy

School had a plan to prevent exposure, but not in the IEP

Court—"There is no legal requirement under the IDEA that Student's Action Plan or other safety measures be fully incorporated into the IEP."

◦ **Barney v. Akron BOE, 70 IDELR 227 (N.D. Ohio 2017)**

Court held that since the allergy was not related to the student's qualifying disability, then the IEP did not have to address it

Confusingly, however, court notes that "it was important for the IEP to note that Student had a peanut allergy..."

Court did not consider school's need to address "school health services"

Guidance on IEPs

Majority position of courts appears to be that IHPs, which contain health accommodations and services, are related services needed for participation, and thus must be in IEP

Creating IHPs by process outside IEP team means parents' IDEA procedural safeguards are circumvented with respect to IHP services

Guidance on IEPs

Best to discuss need for health services, accommodations, and precautions as part of IEP team process

Just as IEPs may contain behavior plans that include positive behavior supports, IEPs can include IHPs that contain plans for implementation of health-related services, accommodations, and precautions

Guidance on IEPs

School nurses can create a draft IHP, in communication with student's doctor

Draft is then reviewed at an IEP team meeting, for consideration with parental input

Then, the final version is incorporated into IEP (document should state with specificity the health services, nurse services, etc)

§504 ELIGIBILITY MISCONCEPTIONS

- **Main Misconception—§504 Eligibility requires “educational need” in the form of impact on “learning” or academics**
- Schools thus may over-focus on the major life activity of learning and on academic performance data in the evaluation (and referral decision)
- This was always a misconception, but even more so after 2008 ADA Amendments Act

§504 ELIGIBILITY MISCONCEPTIONS

- **Memphis CS, 54 IDELR 61 (OCR 2009)**

School took position that students could only qualify if impairment substantially limited major life activity of “learning”

Asthmatic student with good grades thus received only a “medical management plan” and not a 504 plan

School had to agree to corrective action

§504 ELIGIBILITY MISCONCEPTIONS

- **Union City (MI) CS, 54 IDELR 131 (OCR 2009)**

No §504 eligibility for student with bone cancer due to academic performance

But, condition affected walking, PE, climbing steps, field trips

OCR found a failure to identify in violation of §504

○ **Oxnard (CA) UHSD, 54 IDELR 131 (OCR 2009)**

Team evaluated student with IBS based on whether impairment limited learning (instead of digestive function)

OCR finds wrong eligibility questions were asked, leading to restrictive interpretation

And, student in fact needed accommodations (IBS was causing absences, declining GPA)

OCR's POSITION ON HEALTH PLANS VS. §504 PLANS

○ **Many schools have a practice of providing individual health plans (IHPs) , but not §504 plans, to students with chronic health issues**

But, these students have physical impairments that likely limit various anatomical systems, which are considered major life activities...

OCR's POSITION ON HEALTH PLANS VS. §504 PLANS

○ **All body systems/functions are independent "major life activities"**

This, together with the relaxed formulation of "substantial limitation" under ADAAA means many students with chronic health impairments qualify under §504

OCR's POSITION ON HEALTH PLANS VS. §504 PLANS

- Plus, the fact that students have IHPs means they have some form of need for assistance

Thus, disability plus need for services—the trigger for child-find under §504

OCR's POSITION ON HEALTH PLANS VS. §504 PLANS

- Rtl thinking applied to health conditions—If health plan addresses student's needs, then §504 is not necessary

But, OCR says Rtl programs are mitigating measures

And, as such, their beneficial effects must be “subtracted” (which means they easily qualify as “substantially limited”)

- Health plans are a form of “mitigating measure” under ADAAA

North Royalton CSD, 52 IDELR 203 (OCR 2009)

Student with tree nut allergy was not placed in §504 because his “Emergency Action Plan” addressed his allergy

OCR found school only considered major life activity of “learning,” and EAP was a mitigating measure, without which student amply qualified

○ **Health plans are a form of “mitigating measure” under ADA**

Once a school knows a child has a disability, and knows they need assistance, there must be referral to §504

Rtl is best applied when there is no knowledge or suspicion of disability

○ **2012 OCR Dear Colleague Letter (DCL) Q&A on §504—Question 13**

Health plans may not be sufficient if students need services due to disability

If students have impairments, and need services, they are entitled to §504 evaluation, §504 committee meetings, and plans that address their needs

And, they are also entitled to §504 status and non-discrimination protections

○ **2012 OCR Q & A—Question 13**

Why this position? What if the health plan is meeting the student’s needs?...

To OCR, the §504 status and legal protections are as important as the services

Moreover, the §504 process helps ensure better and more complete decision-making (health plans only address medical needs, not classroom issues)

○ **Students with Health Issues and a §504 Right to Equally Safe School Environment**

Washington (NC) Montessori Pub. Charter Sch., 60 IDELR 78 (OCR 2012)—Severe nut allergy case

OCR—Most students do not face life-threatening danger at school

§504 requires schools to provide an equally safe environment to eligible students (extension of nondiscrimination duty)

PRACTICAL GUIDANCE ON MAKING §504 REFERRAL DECISIONS

- **Key Point:** Use a multi-factor approach to determine whether students on IHPs need to be referred for §504 evaluations

Question is whether students with health issues should have health plans developed **under §504 procedures and made part of a complete §504 plan**

- But, OCR has not taken the position that ***all*** students on health plans must be eligible under §504, or that all health plans must be developed under §504

So, how do schools decide which students on IHPs need to be referred to §504?

○ **Factors schools can use to decide if students on IHPs need referral to §504:**

Degree of severity of health condition
 Degree of complexity of health plan
 Risk of health emergency
 Consequences of health emergency
 Frequency of need for health plan items
 Need for mods in classroom
 Need for health plan to function
 Student's classroom performance

○ **School Plan of Action:**

Collect files on IHP students
 Apply factors (nurse may be needed)
 Offer evaluations to selected students
 (parents must consent to evaluation)
 Proceed to evaluation
 Make sound eligibility determinations
 Develop §504 plans that include IHPs

○ **Combating Anti-Eligibility Attitudes:**

Some schools would prefer to avoid §504 eligibility
 This can result in exposure to OCR complaints (which could be broad)
 And, if serious injury occurs to an unidentified child, there could be risk of a case for money damages under §504
 See, e.g., *Montgomery Co. BOE*, 56 IDELR 268 (M.D.Ala. 2011)(failure to update 504 plan led to damages claim)

MODERN OCR DECISIONS ON IHPs

◦ *Prince William Co. (VA)*, 57 IDELR 172 (OCR 2011)

Another angle—OCR deems IHPs for students with recognized disabilities to be a §504 service, even if not in their §504 plan or IEP

Thus, plan must be developed in accordance with §504 procedures (notice, evaluation, committee decision)

MODERN OCR DECISIONS ON IHPs

◦ *Springer (NM) MS*, 11 LRP 65450 (OCR 2011)

Student with pancreatitis had an IHP, but needed no classroom accommodations

OCR ruled that health plan provisions were not developed under §504 procedures, in violation of §504

◦ *Roselle Park (NM) MS*, 112 LRP 17599 (OCR 2011)

Student with mobility issues received an IHP created by a local committee

But, committee did not comply with §504 procedures (it was not a §504 committee), and parent was not notified of her rights under §504

o Diabetes Cases

Opelika (AL) CSD, 111 LRP 47376 (OCR 2011)

Student received Diabetes Management Plan, but no §504 referral, in light of good grades

Note misconceptions of §504 Coordinator

Plan was developed unilaterally by school nurse, rather than §504 committee

o ***Tyler (TX) Ind. Sch. Dist. , 56 IDELR 24 (OCR 2010)***

District's practice was to develop IHPs—not 504 plans—for students with diabetes

Student missed class time due to diabetes, but health plan did not address class issues

After parent requested §504 eval, a §504 plan was developed with a variety of classroom accommodations (in addition to health plan)

o ***Tyler (TX) Ind. Sch. Dist. (OCR 2010)***

Caution!—Conducting §504 evaluations only when parents request them violates §504 child-find obligation (*Forest Hills (OH)*(OCR 2011))

○ Temporary Disabilities

Anaheim (CA) Sch. Dist., 112 LRP 19319 (OCR 2014)

Student with severe leg break (requiring wheelchair for 4 wks)

Parent had to request a §504 evaluation

OCR faulted school for placing student in the front office for lunch and recess (for safety concerns), rather than assigning someone to assist him

○ Temporary Disabilities

Anaheim (CA) Sch. Dist. (OCR 2014)

OCR noted that the evaluation should not have taken as long as an IDEA eval

OCR emphasized that whether a student with a temporary impairment qualifies is a case-by-case determination (but this student definitely qualifies)

○ Expanded OCR Investigations

OCR can expand a single-student complaint into a broader investigation

Clarksville-Montgomery Co. (TN), 60 IDELR 203 (OCR 2012)(1206 students on IHPs, but only 194 identified IDEA or §504)

Memphis (AL), 112 LRP 26130 (OCR 2012)(9824 students on IHPs, very few in §504)

Virginia Beach, 67 IDELR 274 (OCR 2015)(District review of files of all IHP

o Allergies

Torrington (CT) BOE, 60 IDELR 295 (OCR 2012)

Student with severe shellfish allergy placed on IHP (District's policy was no 504 for students with allergies)

Although school evaluated the student after parent asked, OCR found it should have acted earlier

OCR again notes that IHP students lack §504 procedural safeguards

o Allergies

Same in the case of ***Union Cnty. (NC), 64 IDELR 25 (OCR 2014)***(dozens of students on IHPs, none under §504)

o OCR Investigations of IDEA Students

Widefield (CO), 116 LRP 10050 (OCR 2016)

Sp ed student with allergies to nuts and dyes, but IEP did not state services needed to address allergies (although it noted that allergies were "life-threatening")

OCR found §504 violation

○ OCR Investigations of IDEA Students

Grenada (MS), 61 IDELR 54 (OCR 2016)

Sp ed student with diabetes (and other sp ed disabilities) did not have health plan created by IEP team, which never evaluated the diabetes-related needs

OCR found §504 violation

○ Asthma

Campbell (CA) Union, 58 IDELR 200 (OCR 2011)

Student with asthma granted discretionary transfer into district

Although school knew of asthma, it revoked her transfer due to absences

OCR found failure to evaluate, and misperception that since student's grades were good, no §504 referral was required

○ Asthma

See also Travis (CA) USD, 58 IDELR 262 (OCR 2011)

Student with asthma had "Asthma Action Plan" but no §504 action

She was struggling in PE, unable to run a required mile (so she got a D), so coach chalked it up to "lack of effort"

OCR found child-find violation, need for plan to address makeup work, meds administration, PE accommodations

o Health Plans and Extracurricular Activities

Students must have an *equal opportunity to participate* in extracurricular activities and nonacademic services associated with a public school. 34 C.F.R. §104.37.

Commonly, students with health conditions will require health-related accommodations

See, e.g., ***Yakima (WA) SD. No. 7, 114 LRP 35083 (OCR 2014)***(plan required nurse be present if outside 15-minute 911 response area for a summer band camp)

o More Rtl Implications

Hanover County (VA), 115 LRP 37657 (OCR 2015)

District's procedures stated that if interventions by a child study team were successful, school was not obligated to evaluate the student under §504

School has "obligation to evaluate students who need or are believed to need special education and related aids and services, regardless of the efficacy of initial interventions."

o More Rtl Implications

Polk County (FL), 56 IDELR 179 (OCR 2010)(school made struggling student with ADHD go through Rtl for 6 mos)

Forest Hills (OH), 111 LRP 70117 (OCR 2011)(school violated §504 when it required all students with *diabetes* to participate in a three-stage, months-long Rtl process prior to considering §504 eligibility)

More RtI Implications

Harrison County (CO), 111 LRP 62993 (OCR 2011)(ADHD student made to go through RtI despite escalating behaviors, 10 suspensions)

OCR—RTI does not justify delaying or denying the evaluation of a child who, because of a disability, needs or is believed to need special education or related services.”

More RtI Implications

Again, RtI is best used when there is no suspicion or knowledge of disability

And, does RtI make sense outside of context of academic deficits? (USDOE has indicated in sp ed regs that use of RtI under IDEA is applicable only to assist in determinations of learning disabilities

“The [IDEA] Part B regulations do not address the use of an RTI model for children suspected of having other disabilities.” *Letter to Clarke*, 108 LRP 65284 (OSEP 2008).

HIPAA/FERPA Issues

Student medical records and health-related education records are FERPA records not subject to HIPAA

See Joint Guidance on the Application of FERPA and HIPPA to Student Health Records (issued by Depts of Education and HHS in 2008)

Thus, any school employee with a “legitimate educational interest” can access these records
